Senator Tom Coburn, M.D.
Written Questions for the Record
Dr. Stephen Halbrook
July 17, 2009

1. **Do you believe that the Second Circuit in *Maloney v. Cuomo* should have considered whether a Fourteenth Amendment Due Process analysis was required by the Supreme Court's decision in *Heller v. District of Columbia*?**

Yes. The Supreme Court in *Heller* explicitly directed courts to undertake an analysis of its modern jurisprudence to determine whether the Second Amendment is incorporated into the Due Process Clause of the Fourteenth Amendment. Even without this directive, it would be expected that appellate courts would consider the Supreme Court's latest rulings on a given topic.

Nineteenth century cases rejected direct application of the First and Second Amendments to the States based on pre-Fourteenth Amendment precedent.[1] *See United States v. Cruikshank*, 92 U.S. 542, 552-53 (1876); *Presser v. Illinois*, 116 U.S. 252, 265 (1886).[2] Since these cases did not rule on the application of the Second Amendment to the States through the Fourteenth Amendment, *District of Columbia v. Heller*, 128 S. Ct. 2783, 2813 n.13 (2008), admonished: "With respect to *Cruikshank's* continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases."

The only part of the above statement from *Heller* acknowledged by *Maloney v. Cuomo*, 554 F.3d 56, 58 (2nd Cir. 2009) (*per curiam*), was the clause "a question not presented by this case," which referred to whether *Cruikshank* had any validity on incorporation. *Maloney* disregarded the statement that *Cruikshank* "did not engage in the sort of Fourteenth Amendment inquiry *required* by our later cases." (Emphasis added.) Had *Maloney* engaged in that required analysis, it would have acknowledged: "The most familiar of the substantive liberties protected by the Fourteenth Amendment are those recognized by the Bill of Rights." *Planned Parenthood v. Casey*, 505 U.S. 833, 847-48 (1992) (referring to "the specific guarantees elsewhere provided in the Constitution. . . . the right to keep and bear arms").[3]

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[1] *Barron v. Mayor of Baltimore*, 7 Pet. 243, 8 L. Ed. 672 (1833).

[2] For a complete analysis of these cases and their backgrounds, see Halbrook, *Freedmen, the Fourteenth Amendment, & the Right to Bear Arms, 1866-1876* (Praeger 1998), ch. 7; Halbrook, "The Right of Workers to Assemble and to Bear Arms: *Presser v. Illinois*," 76 *Univ. of Detroit Mercy L. Rev.* 943 (Summer 1999).

[3] The most important precedents incorporating substantive Bill of Rights guarantees are cited in my written testimony on page 3, n.2.

Maloney did not cite any of what *Heller* called "our later cases," and instead relied solely on *Presser*. *Presser* held that the Second Amendment did not, in and of itself, limit state action,[4] but made no mention of the Fourteenth Amendment in this discussion.[5] In short, "*Presser* said nothing about the Second Amendment's meaning or scope, beyond the fact that it does not prevent the prohibition of private paramilitary organizations." *Heller*, 128 S. Ct. at 2813.

The Ninth Circuit conducted the required analysis and held that the Second Amendment is incorporated into the Due Process Clause of the Fourteenth Amendment. *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009). The Second Circuit in *Maloney* could have also engaged in a modern Fourteenth Amendment enquiry, even if in the final analysis it concluded that only the Supreme Court may recognize the incorporation of the Second Amendment. Unfortunately, it failed to do so.

2. What role, if any, did protecting the rights of African Americans to arm themselves have in passing the Fourteenth Amendment? Please explain.

The Framers of the Fourteenth Amendment more clearly intended to protect the right of African Americans and all other citizens to keep and bear arms than any other Bill of Rights guarantee. Without the right to provide for their personal security, including protection of their very lives, the freed slaves would be unable to exercise other constitutional rights.

"In the aftermath of the Civil War, there was an outpouring of discussion of the Second Amendment in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly free slaves." *District of Columbia v. Heller*, 128 S. Ct. 2783, 2809-10 (2008), citing Halbrook, *Freedmen, the Fourteenth Amendment, & the Right to Bear Arms, 1866-1876* (Praeger 1998).[6] The Black Codes passed by the Southern States prohibited

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[4]" But a conclusive answer to the contention that *this amendment* [the Second] prohibits the legislation in question lies in the fact that *the amendment* is a limitation only upon the power of congress and the national government, and not upon that of the state." *Presser*, 116 U.S. at 265 (emphasis added).

[5]*Presser* rejected a claim that the ban on unlicensed armed parades violated the Privileges-or-Immunities Clause of the Fourteenth Amendment insofar as it protected the First Amendment right to assemble. *Id.* at 266-68. No such claim was made regarding the Second Amendment.

[6]Other works by this author include "The Freedmen's Bureau Act & the Conundrum Over Whether the Fourteenth Amendment Incorporates the Second Amendment," 29 *Northern Ky. L. Rev.*, No. 4, 683 (2002); "Personal Security, Personal Liberty, & 'the Constitutional Right to Bear Arms': Visions of the Framers of the Fourteenth Amendment," 5 *Seton Hall Constitutional L. Jour.* 341 (Spring 1995); "The Fourteenth Amendment & the Right to Keep and Bear Arms: The Intent of the Framers," *The Right to Keep and Bear Arms*, Rep. of the Subcom. on the Constitution, Senate Judiciary Com., 97th Cong., 2d Sess., 68 (1982).

possession of firearms by African Americans, and a primary purpose of the Fourteenth Amendment was to prevent such State deprivation of Second Amendment rights. *Id.* at 2809-11.

Rep. Zachariah Chandler endorsed the view that freedom for the slaves required that: "'The right of the people to keep and bear arms' must be so understood as not to exclude the colored man from the term 'people.'"[7] Senator Charles Sumner noted a petition of black South Carolinians "that they should have the constitutional protection in keeping arms . . . and in complete liberty of speech and of the press."[8]

The same two-thirds of Congress that passed the Fourteenth Amendment enacted the Freedmen's Bureau Act,[9] which provided that "the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, . . . including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens . . . ."[10] No other Bill of Rights guarantee was the subject of such an explicit declaration by the same Congress that proposed the Fourteenth Amendment.

Explaining the need for the Act, Rep. Thomas D. Eliot recited a report about black soldiers returning home to Kentucky: "Their arms are taken from them by the civil authorities . . . . Thus the right of the people to keep and bear arms as provided in the Constitution is infringed . . . ."[11] This rendered the freedmen "defenseless, for the civil-law officers disarm the colored man and hand him over to armed marauders."[12]

Similarly, the Civil Rights Act of 1866 also protected the "full and equal benefit of all laws and proceedings for the security of person and property . . . ."[13] The Fourteenth Amendment was needed because, as Rep. George W. Julian explained, the Civil Rights Act

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[7]CONG. GLOBE, 39th Cong., 1st Sess. at 217 (1866).

[8]*Id.* at 337 (1866). *See* 2 *Proceedings of the Black State Conventions, 1840-1865*, at 302 (1980) (petition to Congress in 1866 that Second Amendment rights be protected from deprivation by State of South Carolina).

[9]Halbrook, *Freedmen*, 41-42. *See* CONG. GLOBE, 39th Cong., 1st Sess. 3842, 3850 (July 16, 1866).

[10]§ 14, 14 Stat. 176-177 (1866).

[11]CONG. GLOBE, 39th Cong., 1st Sess. at 2774 (1866).

[12]*Id.* at 2775.

[13]14 Stat. 27 (1866) (today's 42 U.S.C. § 1981).

> is pronounced void by the jurists and courts of the South. Florida makes it a misdemeanor for colored men to carry weapons without a license to do so from a probate judge, and the punishment of the offense is whipping and the pillory. . . . Cunning legislative devices are being invented in most of the States to restore slavery in fact.[14]

Introducing the Fourteenth Amendment in the Senate, Jacob Howard distinguished the "privileges and immunities of citizens" in Article IV of the Constitution from "the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as . . . the right to keep and bear arms . . . ."[15] However, this "mass of privileges, immunities, and rights" did not restrain the States. "The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."[16] No one questioned Howard's explanation.

African Americans were advised by the freedman newspaper *The Loyal Georgian* that "you have the *same* right to own and carry arms that other citizens have."[17] The Freedmen's Bureau proclaimed: "All men, without distinction of color, have the right to keep and bear arms to defend their homes, families or themselves."[18]

Constitutional commentator George Paschal wrote: "This clause [the Second Amendment] . . . is based on the idea, that the people cannot be oppressed or enslaved, who are not first disarmed."[19] "The new feature declared [by the Fourteenth Amendment] is that the general principles which had been construed to apply only to the national government, are thus imposed upon the States."[20]

The Framers broadly referred to the right to have arms as being among the rights, privileges, and immunities protected by the Fourteenth Amendment. Rep. Dawes commented on the judicial protection of "these rights, privileges, and immunities" codified in the Civil Rights Act of 1871.[21] Dawes identified them in part as follows:

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[14]CONG. GLOBE, 39th Cong., 1st Sess. 3210 (1866).

[15]Id. at 2765.

[16]*Id.* at 2766.

[17]*The Loyal Georgian*, Feb. 3, 1866, at 1, quoted in Halbrook, *Freedmen*, 19.

[18]*Id.*

[19]George W. Paschal, *The Constitution of the United States* 256 (1868).

[20]*Id.* at 86.

[21]Today's 42 U.S.C. § 1983.

> He has secured to him the right to keep and bear arms in his defense. . . . It is all these, Mr. Speaker, which are comprehended in the words, "American citizen," and it is to protect and to secure him in these rights, privileges and immunities this bill is before the House.[22]

In sum, protection of the right of African Americans to keep and bear arms played a critical role in regard to the history, intent, and purposes of the Fourteenth Amendment. State laws in the form of the Black Codes made it unlawful for newly-freed slaves to possess firearms or to exercise other civil rights, and a primary goal of the Reconstruction Congress was to eradicate these vestiges of slavery. By guaranteeing this basic right to the means of personal security and personal liberty from infringement by State and local governments, the Fourteenth Amendment remains as a guarantee of the Second Amendment rights of all Americans.

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[22]CONG. GLOBE, 42nd Cong., 1st Sess., 475-76 (1871).

Questions to Stephen Halbrook from Senator Hatch

What is the practical effect on America if the Supreme Court rules that the Second Amendment does not protect a fundamental right?

A ruling by the Supreme Court that the Second Amendment does not protect a fundamental right would mean that the federal, state, and local governments could pass virtually any prohibition on the right to keep and bear arms and the courts would uphold it. Any such ruling would also degrade Bill of Rights freedoms in general by postulating that courts may subjectively evaluate explicit guarantees as not being worthy of protection.

A right is "fundamental" if it is "explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 17, 33 (1973). While the Supreme Court has found exceptions to this principle regarding certain procedural rights,[1] an explicitly-protected substantive right is inherently fundamental, and regulation thereof requires strict scrutiny.[2]

District of Columbia v. Heller, 128 S. Ct. 2783 (2008), recognizes the right to keep and bear arms as an explicitly-guaranteed right in the same category as other fundamental rights. "By the time of the founding, the right to have arms had become fundamental for English subjects." 128 S. Ct. at 2798. Blackstone "cited the arms provision of the [English] Bill of Rights as one of the fundamental rights of Englishmen. . . . It was, he said, 'the natural right of resistance and self-preservation,' . . . and 'the right of having and using arms for self-preservation and defence . . . .'" *Id.*, quoting 1 Blackstone, *Commentaries* 139-40 (1765).

"[T]he Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it 'shall not be infringed.'" *Id.* at 2797.

As with other fundamental rights, the explicit nature of "the right of the people" to have arms precludes application of the rational-basis standard of review. As *Heller* states:

Obviously, the same test could not be used to evaluate the extent to which a

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[1]Even with procedural rights, explicitly-named rights are presumably fundamental. *E.g.*, *Pointer v. Texas*, 380 U.S. 400, 404 (1965) ("The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right . . . .").

[2]No constitutional right is "less 'fundamental' than" others, and "we know of no principled basis on which to create a hierarchy of constitutional values . . . ." *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982).

> legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152, n. 4, 58 S.Ct. 778, 82 L.Ed. 1234 (1938) ("There may be narrower scope for operation of the presumption of constitutionality [*i.e.*, narrower than that provided by rational-basis review] when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments . . .").

Id. at 2818 n.27.

Heller rejects a "judge-empowering 'interest-balancing inquiry' that 'asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.'" *Id.* at 2821. Such a test would allow "arguments for and against gun control" and the upholding of a handgun ban "because handgun violence is a problem, [and] because the law is limited to an urban area . . . ." *Id. Heller* responds:

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government – even the Third Branch of Government – the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. . . . Like the First, it [the Second Amendment] is the very *product* of an interest-balancing by the people . . . . And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.

Id.

"[T]his Court has increasingly looked to the specific guarantees of the (Bill of Rights)" as to incorporation and "has rejected the notion that the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights . . . .'" *Benton v. Maryland*, 395 U.S. 784, 794 (1969). The guarantee against double jeopardy was fundamental because it could "be traced to Greek and Roman times," it was "established in the common law of England," and "was carried into the jurisprudence of this Country through the medium of Blackstone, who codified the doctrine in his *Commentaries*." *Id.* at 795. The same is true of the Second Amendment.[3]

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[3] *See Heller*, 128 S. Ct. at 2792, 2798-99, 2805 (discussion of Blackstone and the common law); Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right* 9-20 (1984) (recognition of right to have arms in Greek and Roman law and philosophy); Halbrook, *The*

In sum, the Second Amendment protects the fundamental right to keep and bear arms, including the possession of firearms in the home for lawful purposes. As with other constitutional rights, regulation of this right should be subject to strict scrutiny. However, should the right be subjectively devalued by courts as not fundamental, then any and all firearms could be prohibited and the Second Amendment rendered nugatory.

Why did the Founders believe that the Right to Bear Arms was so important?

The Founders saw the right to keep and bear arms as a fundamental human right. The people, both as individuals and as a group, have an inherent right to preserve their lives and liberties from attack, whether from criminals, tyrants, foreign invaders, domestic terrorists, or any other aggressors. The right is further important for hunting and sporting use, which in turn train citizens in the safe and proper use of arms. The right makes possible a well regulated militia, which the Second Amendment declares to be "necessary to the security of a free State."

St. George Tucker, who wrote the first commentaries on the Second Amendment, perhaps explained it best as follows:

> This may be considered as the true palladium of liberty. . . . The right of self defence is the first law of nature . . . . Wherever . . . the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.

Tucker, *View of the Constitution*, in 1 Blackstone, *Commentaries*, App. at 300 (St. George Tucker ed. 1803).

District of Columbia v. Heller, 128 S. Ct. 2783, 2817-18 (2008), reiterates this theme, explaining how the right to have arms, and why that right precludes a handgun ban, is tied to the right to protect life:

> the inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home "the most preferred firearm in the nation to 'keep' and use for protection of one's home

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Founders' Second Amendment 25-26, 114, 293 (2008) (Founders' reliance on right to arms in writings of Aristotle and Cicero); *id.* at 126-69 (the right to have arms was considered fundamental in every State at the founding).

and family," . . . would fail constitutional muster.

The Second Amendment also prevents oppression: "when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny." *Heller*, 128 S. Ct. at 2801.[4] As stated by the Federalist writer Tench Coxe just after James Madison proposed the Bill of Rights:

> As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed by the next article in their right to keep and bear their private arms.

Federal Gazette, June 18, 1789, at 2, col. 1.[5]

James Madison referred to "the advantage of being armed, which the Americans possess over the people of almost every other nation," in contrast with the European monarchies, where "the governments are afraid to trust the people with arms." *The Federalist* No. 46, *Documentary History of the Ratification of the Constitution*, vol. 15, at 492-93.

The right of the people to keep and bear arms makes possible a well regulated militia, which the Amendment declares is "necessary to the security of a free State." In addition to being called out by the States, the militia has the federal function when being called forth "to execute the Laws of the Union, suppress Insurrections and repel Invasions." U.S. Const., Art. I, § 8, cl. 15. In World War II, when most able-bodied men were sent abroad in the armed forces, citizens with their own arms provided the backbone for protective forces set up by the States to guard against sabotage and enemy infiltration.[6]

However, as *Heller* remarks: "The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting." 128 S. Ct. at 2801. Exercise of the right for purposes such as hunting and sport promotes the militia and self defense purposes.[7]

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[4]*See Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968) ("A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government.").

[5]Madison concurred with Coxe's analysis. Madison to Coxe, June 24, 1789, *The Papers of James Madison*, Charles F. Hobson *et al.* eds. (1979), vol. 12, at 257.

[6]*E.g.*, M. Schlegal, *Virginia on Guard* (1949).

[7]*McConico v. Singleton*, 2 Mill Const. 244, 1818 WL 787, *1 (S.C. Const. Ct. 1818) ("the militia . . . necessarily constitutes our greatest security against aggression; our forest is the great

It is noteworthy that the Framers of the Fourteenth Amendment sought to extend Second Amendment rights to African Americans to defend themselves from racist terrorism. That is why the Freedmen's Bureau Act provided that "the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, . . . including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens . . . ."[8] A significant aspect of Reconstruction is the promotion of Second Amendment rights for freedmen so they could resist Klan attacks.[9]

Nordyke v. King, 563 F.3d 439, 457 (9th Cir. 2009), captured the historical role of the Second Amendment and why it is applicable against the States as well as the Federal government as follows:

> We therefore conclude that the right to keep and bear arms is "deeply rooted in this Nation's history and tradition." Colonial revolutionaries, the Founders,and a host of commentators and lawmakers living during the first one hundred years of the Republic all insisted on the fundamental nature of the right. . . . Colonists relied on it to assert and to win their independence, and the victorious Union sought to prevent a recalcitrant South from abridging it less than a century later. The crucial role this deeply rooted right has played in our birth and history compels us to recognize that it is indeed fundamental, that it is necessary to the Anglo-American conception of ordered liberty that we have inherited. We are therefore persuaded that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment and applies it against the states and local governments.

How would you describe Judge Sotomayor's view on the 2nd Amendment?

Judge Sotomayor joined in two *per curiam* decisions holding that the right to keep and bear arms is not fundamental and does not apply to the States through the Fourteenth Amendment. The author of a *per curiam* opinion is unknown – all that can be ascertained is that the three judges on the panel agreed with it. Such opinions are normally reserved for cases where precedent is clearly applicable and little or no substantive discussion is warranted.

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field in which, in the pursuit of game, they learn the dexterous use and consequent certainty of firearms").

[8]§ 14, 14 Stat. 176-177 (1866).

[9]Halbrook, *Freedmen, the Fourteenth Amendment, & the Right to Bear Arms, 1866-1876*, *passim* (1998).

The panel in *United States v. Sanchez-Villar*, 99 Fed. Appx. 256, 258, 2004 WL 962938 (2nd Cir. 2004), held that mere possession of a firearm gave rise to probable cause for a search, seizure, and arrest. The validity of a State law making it a crime merely to possess a firearm raises issues under the core Second Amendment right to "keep" arms. The panel offered no analysis and relied on a 1984 Second Circuit case stating that "the right to possess a gun is clearly not a fundamental right." Both that case and *Sanchez-Villar* involved illegal aliens with firearms, but the intervening decision in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990), held that "the people" referred to in the First, Second, and Fourth Amendments "refers to a class of persons who are part of [our] national community," and excludes illegal aliens. *Sanchez-Villar* made no mention of this Supreme Court precedent.[10]

In *Maloney v. Cuomo*, 554 F.3d 56, 58 (2nd Cir. 2009), *cert. petition filed*, No. 08-1592 (June 26, 2009), the panel relied on a nineteenth-century Supreme Court decision holding that the Second Amendment does not apply *directly* to the States. The panel referred to the following statement in *District of Columbia v. Heller*, 128 S. Ct. 2783, 2813 n.23 (2008), only regarding the "question not presented" and ignored the "required" inquiry: "With respect to *Cruikshank's* continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases." This matter is discussed in more detail in my written testimony.

Each of the above panels devoted just a few sentences, composing one paragraph each, to the Second Amendment issues raised.

The courts of appeal decide many cases *per curiam*, and it would be unfair to conclude that everything in a *per curiam* opinion represents the considered views of each judge on the panel. However, it would be well to remember the following words of wisdom of Justice Frankfurter in *Ullmann v. United States*, 350 U.S. 422, 428-29 (1956):

> As no constitutional guarantee enjoys preference, so none should suffer subordination or deletion. . . . To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution.

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[10]In addition, by this time *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002), had been decided, holding that the Second Amendment protects an individual right. While obviously not precedent in the Second Circuit, the decision warranted discussion.